Supreme Court, U.S.
FILED

961528 JAN 21 1997

No.

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

DANIEL R. LOVING,

Petitioner,

vs.

PIRELLI CABLE CORPORATION, PENSION PLAN FOR SALARIED EMPLOYEES OF PIRELLI CABLE CORPORATION, AND PIRELLI CABLE CORPORATION, PLAN ADMINISTRATOR OF SALARIED PENSION PLAN,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

1. Does the doctrine of Exhaustion of Administrative Remedies under ERISA § 503 (29 U.S.C. § 1133) require notice to a plan participant of the denial of his appeal of his claim by the plan administrator before his federal cause of action arises under Section 502(a)(1)(B), ERISA (29 U.S.C. § 1132(a)(1)(B)) to pursue enforcement of his claim for benefits?

2. Does an action for employee benefits under an employee benefit plan require analysis based on the federal common law of contracts?

LIST OF PARTIES

The list of parties to this case are Daniel R. Loving, Pirelli Cable Corporation as plan administrator and corporately, and the Pension Plan for Salaried Employees of Pirelli Cable Corporation.

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Petitioner Daniel R. Loving, petitions for a writ of certiorari to review the Judgment Order entered August 21, 1996, by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Judgment Order of the Court of Appeals (App., *infra*, 1a) is not reported. The Order of the district court (App., *infra*, 3a) is not reported.

STATEMENT OF JURISDICTION

The Judgment Order of the Court of Appeals was entered on August 21, 1996. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed. The Court of Appeals ordered Defendants to respond to that Petition. On October 21, 1996 the Court of Appeals denied the Petition and rejected the Suggestion for Rehearing En Banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are sections 502(a)(1)(B) and 503 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), and § 1133, and are reproduced at App., *infra*, 9a-10a.

The three-year Delaware statute for limitations of contract actions is 10 Del. C. § 8106, *infra*, at 10a-11a.

STATEMENT OF THE CASE

Petitioner Daniel R. Loving separated from service on November 6, 1987 under a "window" program for which he did not qualify due to the method of crediting service which the plan administrator applied to his service with Pirelli Cable

Corporation under the Salaried Plan. On October 31, 1990 Loving filed a Claim for Benefits with the plan administrator to obtain clarification and recalculation of his service credits under the Salaried Plan. This Claim for additional benefits was denied on January 3, 1991.

Loving appealed this denial as required by plan terms on March 1, 1991 and this Appeal was subsequently denied on April 22, 1991. Loving then filed his action in the District of Delaware on April 20, 1994 under ERISA § 502(a)(1)(B) for clarification of his rights to benefits under terms of the plan.

After oral argument, the district court issued an Order dismissing Loving's claims as being beyond the statute of limitations. The district court provided no analysis of Loving's position that his claims were contractual as being based on plan terms, and therefore subject to Delaware's three-year statute of limitations for claims based on contract or statute (10 Del. C. § 8106), and therefore timely.

Loving appealed to the Third Circuit which, after briefing and oral argument, entered a Judgment Order affirming the Delaware District Order. Again, no analysis was made of Loving's position that his ERISA claims were contractual in nature so as to allow a three-year limitations period to apply, that he had followed the plan terms for exhausting his administrative remedies under the terms of the Plan, and that his cause of action could not begin to run until the denial of his *appeal* to the plan administrator had been sent to him.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred in affirming the Order of the district court dismissing the within Action by not applying the doctrine of exhaustion of remedies to determine that Petitioner's

cause of action did not arise until after his Appeal to the plan administrator had been finalized and communicated to him. This Petition is being presented on the following bases and the reasons and legal position contained here:

I.

LEGAL ANALYSIS AND AUTHORITIES; DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIRES APPEAL TO PLAN ADMINISTRATOR BEFORE FEDERAL COURT HAS JURISDICTION:

1. Based on past decisions of the Third Circuit Court of Appeals, procedures for benefits claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(1)(B), require a claimant to *appeal* his claim through the administrative procedures of the employee benefit plan. This requirement of the exhaustion of remedies process is a case law condition precedent which must be met prior to federal court accepting jurisdiction of a claim for benefits under an ERISA plan. This exhaustion requirement prevents bringing a cause of action until the plan administrator has fully considered the claim.

If a plan participant claimant has not fulfilled this process, his cause of action is dismissed as premature or not perfected as indicated by cases in both the Third Circuit and other circuits.

By virtue of this mandate, the Judgment Order of August 21, 1996, is contrary to settled case law and judicial pronouncements of the Third Circuit. The basis of this Judgment Order affirmed the district court of Delaware Order that ruled that the statute of limitations period for a benefits claim began *as of the date of the initial denial of a claim*, that is, prior to completion of the appeal requirement to the plan administrator. The effect of the Court of Appeal's Judgment Order affirming

the district court Order is to negate the requirement that the doctrine of exhaustion of remedies requires an *appeal* of any denied claim be made to the plan administrator. In the within case the terms of the Salaried Plan so require.

In addition, the Judgment Order of August 21, 1996, provides no explanation as to why case law and analysis provided as authority is inapplicable to Loving's legal position(s).

2. Lack of decisional reasoning or other analytical basis in the August 21, 1996 Judgment Order denies Loving his benefits without regard for his exhausting his remedies and the appeal he made to the plan administrator prior to filing suit. As a Judgment Order contains no reasoning, it must rely on the *reasoning of the Order below* where no case law or other statutory analysis or authority was used as indicating why the decision was made or on what legal basis it was made. The only legal position put forth by district court was its conclusion that Loving's claim for benefits under ERISA did not have to be appealed to the plan administrator to be considered a starting point for the statute of limitations.

3. Judgment Order (August 21, 1996) entered herein overrules by implication Third Circuit cases previously reviewed and decided on the merits by the Third Circuit. This conclusion is unavoidable because the Judgment Order relies on the proposition that Mr. Loving's cause of action accrued *when he received an initial denial* of his claim for benefits from the plan administrator, not when he received a Denial of *his Appeal* from the plan administrator.

a. The clearest statement as to the effect of exhaustion of remedies on perfecting a claim for statute of limitations purposes is in the Fourth Circuit in the case of *Kroschinsky v. Trustees of S.S. Trade Ass'n*, 790 F. Supp. 559, 561 (D. Md.

1992). The Court applies the principle that the limitations period for wrongful denial of employee benefits brought under ERISA Section 502(a)(1) (29 U.S.C. § 1132(a)(1)) does not begin to run until the plaintiff has exhausted all remedies under the plan's internal **appeals** process *and been notified of the final decision* denying the benefits claim.

b. *Weldon v. Kraft, Inc.*, 896 F.2d 793, 800 (3rd Cir. 1990) determined that "Weldon *failed to appeal the denial of his claim to the administrator*." *Id.* at 800. This appeal completed the exhaustion of his administrative remedies which was required.

> Except in limited circumstances that are not alleged here *a federal court will not entertain an ERISA claim* unless the plaintiff has exhausted the remedies available under the plan.

(Emphasis supplied). *Id.* at 800.

The August 21, 1996 Judgment Order does away with the requirement of an **appeal** of claim denial as being a necessary step in exhaustion of remedies in perfecting a benefits claim, since it accepts the Delaware District Court's opinion expressed at Oral Argument that the initial administrative decision of the plan administrator denying Loving's claim initiated the running of the statute of limitations.

The effect is to establish that *the cause of action for a benefits claim arises prior to the exhaustion of remedies* as defined and delineated by the Third Circuit and other circuits. Not only are appeal requirements part of 29 U.S.C. § 1133, (Section 503, ERISA), and its companion Department of Labor regulation 29 C.F.R. § 2560.503-1, they were required by the Salaried Plan document to perfect Loving's claim as a jurisdictional step to the maturing of his cause of action.

c. *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 185, 186 (3d Cir. 1984), cited by *Weldon*, at 800, also states that the cause of action for a benefits claim under ERISA cannot arise until a claimant completes the administrative review to include *an appeal of denial of the initial claim* under the rules of the plan and thus provide the court with jurisdiction to hear the claim. Since a statute of limitations cannot begin until a cause of action arises, the Judgment Order removes the theory of exhaustion of remedies as a condition precedent to perfecting a denied benefits claim for purposes of bringing a claim before a federal court.

d. The theory of exhaustion of remedies *to include an appeal* as a jurisdictional requirement for bringing a cause of action is consistent with the Eleventh Circuit decisions in *Variety Children's Hospital, Inc. v. Century Medical Health Plan, Inc.*, 57 F.3d 1040, 1042 (11th Cir. 1995), and *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 160 (11th Cir. 1992). Failure to exhaust administrative remedies prior to bringing an ERISA claim for benefits in federal court prevents the action from being heard and requires dismissal of the claim. Since the claim is not ripe, the statute of limitations does not begin to run. The Judgment Order herein accepts the Order below which ignored the appeals portion of the exhaustion of remedies requirement.

e. The district court of the Eastern District of Pennsylvania understands that the Third Circuit requires exhaustion of all administrative remedies available under the plan prior to seeking judicial review. The Judgment Order entered herein *denying* the appeal element as necessary to perfect a claim (and the beginning of the running of the statute of limitations) is contra to this position used by the court in *Kimble v. International Broth. of Teamsters*, 826 F. Supp. 945, 947 (E.D. Pa. 1993). This case also cites as authority the Third Circuit's decision of *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 916

(3rd Cir. 1990), and *Weldon, supra*, that a further claims appeal is required. Also cited in *Kimble* is *Tomczyscyn v. Teamsters, Local 115 Health & Welfare*, 590 F. Supp. 211, 216 (E.D. Pa. 1984) (Court held that employee's denial letter did not sufficiently suggest that trustees would deny further appeal and that appeal to the plan administrator is required). *Kimble*, at 947.

f. The Sixth Circuit takes the position that failure to exhaust administrative remedies bars the commencement of an ERISA claim in the courts. *See Metropolitan Life Ins. Co. v. Person*, 805 F. Supp. 1411, 1419 (E.D. Mich. 1992). As a result of the effect of the Judgment Order herein, the Third Circuit's reversal of position on failure to exhaust remedies to include an appeal as barring a claim in court is contra to the Sixth Circuit view discussed in *Person*.

g. *Epright v. Environmental Resources Management, Inc.*, 81 F.3d 335, 341, 342 (3d Cir. 1996), is specific in requiring that *a plan administrator must follow* 29 C.F.R. § 2560.503-1(f) in administering the plan to provide information to the participant on *how to obtain a review of his benefits denial.* The effect of the plan administrator not following this regulation to allow proper review by the plan administrator is to render the time bar for such a review ineffectual and allow "Mr. Epright to perfect his claim." *Id.* at 342.

Since the review (appeal) of the denial of Mr. Epright's claim was required by the Department of Labor's regulations (29 C.F.R. § 2560.503-1) in order to perfect his claim, the *Epright* court decision must be considered as being reversed based on the Third Circuit Court's decision to declare DOL Reg. § 2560.503-1 ineffectual as affecting Loving's rights to perfect his benefits claim for review by a court of law.

h. Claimants must exhaust their administrative remedies prior to pursuing their rights under ERISA plans in the Federal Circuit. *See Communications Workers of America v. American Telephone and Telegraph Company,* 40 F.3d 426, 431-32 (D.C. Cir. 1994) and cases cited therein from the Fifth, Seventh, Ninth, Eleventh and Fourth Circuits as well as the Third Circuit case of *Weldon v. Kraft, supra.*

i. The Second Circuit has also required exhaustion since failure to appeal a denial of a claim for benefits will require dismissal of a claimant's cause of action. *See Kennedy v. Empire Blue Cross and Blue Shield,* 989 F.2d 588, 594 (2nd Cir. 1993).

j. Finally, *Conley v. Pitney Bowes,* 34 F.3d 714, 716, 717 (8th Cir. 1994) only requires exhaustion where the plan terms require it. However, in the instant matter, the Salaried Plan did require such an appeal as a procedure to complete full consideration of a claim.

4. The effect of the Judgment Order is not only contrary to the above cases but is contrary to the plain meaning of 29 U.S.C. § 1133, (Section 503, ERISA) which requires *both* the plan participant and the plan administrator to follow its scheme for exhausting administrative remedies prior to bringing a cause of action in federal court. The result is also contrary to Department of Labor Regulation interpreting Section 503, ERISA, (29 C.F.R. § 2560.503-1 claims procedure) which not only provides for an appeal requirement but also provides protections for plan participants in the form of proper notice of why their claims are being denied.

In particular, Section 2560.503-1(a), (e), (f), (g) and (h) provide:

(a) Scope and purpose. (1) This section

sets out certain minimum requirements for employee benefit plan procedures pertaining to claims by participants and beneficiaries (claimants) for plan benefits, consideration of such claims, and review of claim denials, hereinafter referred to in the aggregate as "claims procedures." Except as otherwise noted, *these requirements apply to every employee benefit plan* described in section 4(a) and not exempted under section 4(b) of the Employee Retirement Income Security Act of 1974 (the Act).

* * *

(e) Notification to claimant of decision. (1) If a claim is wholly or partially denied, notice of the decision, meeting the requirements of paragraph (f) of this section, shall be furnished to the claimant within a reasonable period of time after receipt of the claim by the plan.

* * *

(f) Content of notice. *A plan administrator . . . shall provide* to every claimant who is denied a claim for benefits *written notice* setting forth in a manner calculated to be understood by the claimant:

* * *

(4) Appropriate information as to the *steps to be taken if* the participant

or beneficiary wishes to submit his or her *claim for review.*

(g) Review procedure. (1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative *has a reasonable opportunity to appeal* a denied claim to an appropriate named fiduciary . . . under which a full and fair review of the claim and its denial may be obtained.

* * *

(h) Decision on review. (1) (i) A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, . . .

* * *

(3) The decision on review shall be in writing and shall include specific reasons for the decision, . . .

(4) *The decision on review shall be furnished to the claimant* within the appropriate time described in paragraph (h)(1) of this section.

(Emphasis supplied).

II.

PENSION PLAN CLAIMS ARE DETERMINED BY CONTRACT LAW WHICH CALLS FOR APPLICATION OF THE STATUTE OF LIMITATIONS PERIOD FOR CONTRACT CLAIMS IN DELAWARE (3 YEARS), 10 DEL. C. § 8106:

The Judgment Order of August 21, 1996 accepts the suggestion of the Order of the Delaware District Court that a benefits claim would apply a non-contract period of statute of limitations. This conclusion and that of the district court are contrary to the positions expressed by the Third Circuit Court in both *Kemmerer v. ICI Americas, Inc.*, 70 F.3d 281, 287, 288 (3rd Cir. 1995) and, recently, *Senior Executive Benefit Plan Participants v. New Valley Corp.*, 89 F.3d 143, 149, 150 (3rd Cir. 1996).

While the *New Valley* case makes a distinction between written plan requirements of most ERISA plans, versus the oral contract (no ERISA requirement that a top hat plan be written) of a top hat plan, both cases base their analysis on the federal common law of contract. *New Valley,* at 149.

Also applicable is *Conley v. Pitney Bowes, supra,* at 717, where the Eighth Circuit is clear that the federal common law of contracts is the framework for interpreting an ERISA benefits claim.

III.

PUBLIC POLICY AND EFFECT ON ESTABLISHED PROCEDURES:

1. The effect of the August 21, 1996 Judgment Order is to

void accepted plan procedures of every ERISA plan within the jurisdiction of the Third Circuit which has emplaced its *appeal* procedures via Section 503 and DOL Reg. 29 C.F.R. § 2560.503-1.

2. Not only has the August 21, 1996 Judgment Order negated familiar and certain DOL rules and their effect on plan procedures, it has created a disruption of great magnitude in relied-upon protections for beneficiaries and plan participants established by Section 503, ERISA, and DOL Reg. 29 C.F.R. § 2560.503-1. A claimant will be forced into court after his or her claim is *initially* denied even though no review has been completed on the part of the plan administrator. This will have the effect of a claimant having to bring a cause of action and pay filing fees without knowing if his claim is being denied or upheld by the plan administrator. In the case of a plan administrator who fails to respond to the claimant's appeal, the claimant will be filing an action unnecessarily or prematurely.

The Judgment Order of the Third Circuit will have also created a tool for a manipulative plan administrator to avoid the requirements of DOL Reg. 29 C.F.R. § 2560.503-1. As counsel for Pirelli stated at Oral Argument, defendants would immediately move to dismiss, or to stay the action.

3. All claimants who heretofore were expected to proceed on their own without an attorney *to seek an appeal* of their claim to the plan administrator now will have to seek the involvement of an attorney and the resultant cost thereof. Attorney fees for such "pre-litigation ERISA plan appeals" have been denied as a recognized unnecessary legal cost which is not supposed to be required until the plan administrator has considered the denied benefits claim *on appeal* and denied the appeal, thus allowing the cause of action to accrue.

It would not be out of the question for an unscrupulous plan administrator to *not respond to the initial claim for benefits,* thereby requiring an analysis as to when this time period begins to run. Such a failure to respond requires the claim to be "deemed to be denied" if no response is forthcoming within 90 days. *See* DOL Reg. 29 C.F.R. § 2560.503-1(e)(3), deeming a reasonable period for response to be not in excess of 90 days.

Where the plan calls for an appeal within 60 days, but the plan administrator has not responded, the initial claim may perhaps either be deemed to be denied after 90 days, or after 60 days for appeal period to start (and the Statute of Limitations to start). *See* DOL Reg. 29 C.F.R. § 2560.503-1(g)(3).

For any one individual claimant dealing with such a quandry, he now has to seek out an attorney for an interpretation or try to analyze the Summary Plan Description on his own. Where the next step (appeal) is expected to be taken without counsel, and no response is received from the plan administrator, participants will have been denied statutory protections and a lack of due process through loss or deprivation of plan benefits on a procedural technicality.

CONCLUSION

For all of the above reasons, Petitioner Daniel R. Loving by this Petition suggests this matter as presented by the Judgment Order of the Third Circuit Court of Appeals entered August 21, 1996, is appropriate for review in order to resolve the consistency of the effect of the ruling with prior pronouncements of the Third Circuit and those of other circuit courts and district courts using such positions as bases for their decisions.

Respectfully Submitted,

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APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ARGUED AUGUST 8, 1996 AND ENTERED AUGUST 21, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7597

DANIEL R. LOVING

Appellant

v.

PIRELLI CABLE CORPORATION, a Delaware corporation; PENSION PLAN FOR SALARIED EMPLOYEES OF PIRELLI CABLE CORPORATION; PIRELLI CABLE CORPORATION, PLAN ADMINISTRATOR OF PENSION PLAN

Appeal from the United States District Court
for the District of Delaware
No. 94-205
District Judge: Honorable Roderick R. McKelvie

Argued: August 8, 1996

Before: NYGAARD, LEWIS, AND MCKEE, *Circuit Judges.*

JUDGMENT ORDER

After careful review of the record and consideration of all of appellant's contentions, to wit, that: (1) under the Employee Retirement Income Security Act of 1974 (ERISA) § 503, 29 U.S.C. § 1133, appellant's cause of action did not accrue until

after the plan administrator had given notice denying an appeal from the decision denying benefits; (2) the three-year statute of limitations as set forth in Del. Code Ann. tit. 10 § 8106 (1975), rather than the one-year statute of limitations as set forth in Del. Code Ann. tit. 10 § 8115 (1975), applies to appellant's claim; (3) appellee's failure to provide requested plan information constituted breach of fiduciary duty; and (4) appellant's request for plan information is not subject to separate statute of limitations where request is pursuant to ERISA § 502; and (5) appellant is eligible for requested pension benefits, it is

ADJUDGED AND ORDERED that the judgment of the district court entered on October 18, 1995 be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

s/ illegible
Circuit Judge

Attest:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

AUG 21, 1996

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED OCTOBER 18, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 94-205-RRM

DANIEL R. LOVING,

Plaintiff

v.

PIRELLI CABLE CORPORATION, a Delaware Corporation; PENSION PLAN FOR SALARIED EMPLOYEES OF PIRELLI CABLE CORPORATION; and PIRELLI CABLE CORPORATION, Plan Administrator of PENSION PLAN,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR REARGUMENT AND CLARIFICATION

In this E.R.I.S.A. case, plaintiff has moved for reargument and clarification of the basis for the Court's March 29, 1995 Order Granting Summary Judgment. Docket Item ("D.I.") 36. In that order, the Court stated "[f]or the reasons set out by the court during the March 28, 1995, oral argument . . . plaintiff's claims are barred by the applicable statute of limitations." Plaintiff requests that the "Court [ ] make clear that the only basis for accepting the statute of limitations as a bar to Plaintiff's claims is the application of the three-year period beginning January 3, 1991." In addition, the Court stated at the March 28,

1995 hearing that "you may file for reargument . . . and that, in the reargument, you may identify case law that speaks *directly* to the issue" of whether a cause of action on an E.R.I.S.A. benefits claim does not accrue until after the final exhaustion of internal plan appeals. Transcript ("TR.") at 33.

A party may file for reargument pursuant to Local Rule 7.1.4 within 10 days after the filing of the Court's opinion. However, "[reargument] should not be granted where it would merely accomplish repetition of arguments that were or should have been presented to the court previously." *Karr v. Castle*, 768 F. Supp. 1087, 1093 (D. Del. 1991). In addition, "the procedural mechanism afforded by Local Rule [7.1.4] should not be undermined to allow for endless debate between the parties and the Court." *Brambles v. Blocker*, 735 F. Supp. 1239, 1241 (D. Del. 1990).

Here, plaintiff has not addressed any case law that addresses directly the issue of whether the statute of limitations on an E.R.I.S.A. benefits claim does not accrue until after the final exhaustion of internal plan appeals. Instead, plaintiff repeats his argument made on March 28, 1995, that a plaintiff must exhaust internal plan administrative remedies before filing suit in a federal court. Plaintiff's argument is a "mere repetition" of an argument presented elsewhere. *Karr*, 768 F. Supp. at 1093. As a result, his motion for reargument is denied.

Plaintiff also requests that the Court clarify the basis for its Order Granting Summary Judgment. Plaintiff "asks the Court to make clear that the only basis for accepting the statute of limitations as a bar to Plaintiff's claims is the application of the three-year period beginning January 3, 1991." The Court, however, clearly set out the basis of its decision. On page 35 of the Transcript, the Court states:

Appendix B

> "I'm prepared to find that, the two claims would have arisen by January of '88 . . . and [plaintiff's claim] is barred whether you use the one year or three [year statute of limitations]. . . . However, I'm also prepared to find that . . . at least by [January 3, 1991], the statute of limitations would have begun to run on both claims and those claims would have been barred by the three-year statute. And that is the basis for my decision, which is the January 3, 1991, decision [ ] encompassed in the 1988 decision, and to the extent you want to defend both on appeal, you [can] defend both on appeal."

Defendants are correct when they state that "[c]learly, the Court has ruled that plaintiff's claims are barred regardless of whether they accrued in January 1988 or January 1991." D.I. 42 (Defendants' Response to Plaintiff's Motion for Clarification and Reargument). As a result, plaintiff's motion for clarification is denied. Thus, for the reasons set out above,

IT IS HEREBY ORDERED, plaintiff's motion for clarification and reargument (D.I. 40) is denied.

s/ illegible
UNITED STATES DISTRICT JUDGE

Date: October 18, 1995

APPENDIX C — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE FILED MARCH 29, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 94-205-RRM

DANIEL R. LOVING,

Plaintiff,

v.

PIRELLI CABLE CORPORATION, a Delaware corporation; PENSION PLAN FOR SALARIED EMPLOYEES OF PIRELLI CABLE CORPORATION; and PIRELLI CABLE CORPORATION, Plan Administrator of PENSION PLAN,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

For the reasons set out by the court during the March 28, 1995, oral argument, the court finds there is no genuine issue of fact material to the issues raised by defendants' motion for a summary judgment (Docket Item 27), and that plaintiff's claims are barred by the applicable statute of limitations. Consequently, the court will grant defendants' motion. Therefore,

IT IS HEREBY ORDERED that the clerk shall enter judgment in favor of the defendants and against the plaintiff on all claims in the complaint.

Appendix C

s/ illegible
UNITED STATES DISTRICT JUDGE

Dated: March 29, 1995

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 94-205-RRM

DANIEL R. LOVING,

Plaintiff,

vs.

PIRELLI CABLE CORPORATION, a Delaware corporation; PENSION PLAN FOR SALARIED EMPLOYEES OF PIRELLI CABLE CORPORATION; and PIRELLI CABLE CORPORATION, Plan Administrator of PENSION PLAN,

Defendants.

JUDGMENT

On March 29, 1995, the court entered an Order granting summary judgment for the defendants on the claims in the plaintiff's complaint.

IT IS HEREBY ORDERED that judgment is entered in favor of the defendants Pirelli Cable Corporation, Pension Plan for Salaried Employees of Pirelli Cable Corporation and Pirelli Cable Corporation, Plan Administrator of Pension Plan and against the plaintiff Daniel R. Loving on the claims in the plaintiff's complaint.

s/ Lisa I. Brown
Deputy Clerk of Court

Dated: March 29, 1995

APPENDIX D — RELEVANT STATUTES

SECTION 502 CIVIL ENFORCEMENT

(a) A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary, (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

* * *

SECTION 503 CLAIMS PROCEDURE

In accordance with regulations of the Secretary, every employee benefit plan shall —

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

10 Del. Code § 8106. Actions subject to 3 year limitation.

No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall

be brought after the expiration of 3 years from the accruing of the cause of such action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title. (Code 1852, § 2742; Code 1915, § 4671; Code 1935; § 5129; 46 Del. Laws, c. 115, § 1; 10 Del. C. 1953; § 8106; 57 Del. Laws, c. 568, § 2.)

Supreme Court, U.S.
FILED
APR 25 1997
OFFICE OF THE CLERK

No. 96-1528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL R. LOVING,

Petitioner,

vs.

PIRELLI CABLE CORPORATION, PENSION PLAN FOR SALARIED EMPLOYEES OF PIRELLI CABLE CORPORATION, AND PIRELLI CABLE CORPORATION, PLAN ADMINISTRATOR OF SALARIED PENSION PLAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether the Judgment Order of the Third Circuit Court of Appeals should be affirmed on the grounds that a claim for denial of pension benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S. C. Section 1001 et seq. accrues when a participant learns that he will not receive a benefit to which he believes he is entitled or, in the alternative, when a claim for benefits under the pension plan is first formally denied.

2. Whether the Judgment Order of the Third Circuit should be affirmed on the alternative grounds that the Petitioner's ERISA pension benefit claims were barred by the Delaware one year statute of limitations set forth in Delaware Code Annotated, title 10, Section 8115 (1975), rather than the three-year limitations period set forth in Delaware Code Annotated, title 10, Section 8106 (1975).

3. Whether the Judgment Order of the Third Circuit should be affirmed on the alternative grounds that: (i) Petitioner's pension benefit was properly calculated under the applicable provisions of the Pension Plan for Salaried Employees of Pirelli Cable Corporation; and (ii) Petitioner was properly denied participation in the 1987 early retirement incentive program.

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Pirelli S.P.A.

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PRELIMINARY STATEMENT

Petitioner Daniel R. Loving seeks a writ of certiorari with respect to a Judgment Order of the Third Circuit Court of Appeals based on his speculation as to the implications of that decision and its potential conflict with decisions recognizing a duty to exhaust ERISA employee benefit plan remedies. Petition at 3-4. As explained below, there is no such conflict and the decisions cited by Loving are entirely consistent with the conclusion of the District Court — which Loving assumes is the basis of the Third Circuit's affirmance — that Loving had not diligently pursued his benefits claims and that his claims were therefore barred by the statute of limitations.

Indeed, the position implicitly advocated by Loving in his Petition, i.e., that the federal discovery rule (which holds that a statute of limitations period begins to run upon the discovery of an injury) should not apply to his ERISA benefits claim, is contrary to the decisions of numerous Circuit Courts. As explained below, the Circuit Courts have routinely applied the discovery rule in ERISA benefits claim cases and have held, as a result, that such claims accrue when a participant learns that he will not receive a benefit to which he believes he is entitled or when a claim for benefits is first denied. Loving has not cited any Circuit Court decision to the contrary. Thus, adoption of Loving's position would have in fact created an inconsistency with decisions of other Circuit Courts.

As the Circuit Court decisions implicitly recognize, ERISA plan participants are not prejudiced by application of the discovery rule so long as he or she is diligent in invoking the

available plan remedies within the applicable statute of limitations period. Loving's claim was dismissed by the District Court precisely because he was not diligent and waited until after the limitations period had expired before exhausting plan remedies.[1]

There are at least three alternate bases on which the Third Circuit could have affirmed the District Court's decision, i.e., (i) that the statute of limitations on Loving's ERISA benefits claim began to run when he first learned that he would not receive a benefit to which he believed he was entitled or when his claim for benefits was first denied; (ii) that Loving's benefits claim is governed by a one year statute of limitations rather than a three year limitations period; or (iii) that Loving's benefit entitlement was correctly determined by the Pirelli Pension Plan for Salaried Employees. The possibility that any of these alternate bases could have been the basis for Third Circuit's affirmance of the decision of the District Court, and the possibility that the Supreme Court could also affirm on any one of these bases, is yet another compelling reason why a writ or certiorari should be denied. See Sanson Hosiery Mills v. NLRB, 344 U.S. 863 (1952); The Arlington, Inc. v. Mayer, 339 U.S. 965 (1950).

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[1] The Judgment Order of the Third Circuit notes that the court had considered all of the arguments raised by Loving in his appeal, the Order does not specify on what particular basis the court affirmed the District Court dismissal of Complaint. The decision of the District Court is set forth in the transcript of the oral argument on Respondents' Motion for Summary Judgment.

BRIEF STATEMENT OF THE CASE

Loving is a former employee of Pirelli Cable Corporation ("Pirelli") who was discharged in 1987. He challenges the calculation of his pension benefits under the terms of a pension plan that was terminated in 1989. Loving specifically challenges (1) the method by which his pension benefit was calculated under the Pension Plan for Salaried Employees of Pirelli Cable Corporation (the "Salaried Plan") when his employment with Pirelli was terminated in the fall of 1987; (2) the determination, also made in the fall of 1987, that he did not qualify for an early retirement incentive program offered at that time; and (3) the alleged denial in the fall of 1987 of his oral request for information from the Salaried Plan. Loving's claim for benefits was brought pursuant ERISA § 502(a)(1)(B), and his claim for denial of information was brought under ERISA § 502(c).[2]

Notwithstanding the fact that all of the events that form the basis of his claims occurred in 1987, Loving nonetheless waited until April 1994 -- more than six years -- before commencing this action. During the intervening six-year period, there were numerous occasions when Loving again was put on notice that he may have had a legal claim to pursue in connection with his pension benefits.

For instance, in January 1988, Loving was informed of the precise amount of his pension benefit entitlement. In May

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[2] Loving's Petition does not object to the lower courts' decision with respect to his Section 502(c) claim.

1989, after the Salaried Plan was terminated and its assets were distributed, Loving was informed again of the precise amount of the annuity purchased for his benefit in connection with the Salaried Plan termination in order to provide for his pension benefit. Nevertheless, although he knew by these notices that he was not going to receive the amount he now claims, Loving did not commence this action for almost another five years.

Eventually, on October 31, 1990, Loving, through his attorney, submitted a formal claim for additional pension credit and for participation in the 1987 early retirement incentive program. The Salaried Plan formally denied this claim on January 3, 1991. Even then, Loving waited more than three years before commencing this action on April 20, 1994.

By oral decision on March 28, 1995, the District Court granted summary judgment to Pirelli, dismissing all of Loving's claims as a matter of law. The District Court determined that Loving's ERISA Section 502(a)(1)(B) claim accrued either on January 18, 1988, when he was first notified of his pension entitlement, or, at the latest, on January 3, 1991, when his claims were formally denied by the Salaried Plan. The lower court rejected Loving's contention that the running of the statute of limitations should not be deemed to commence until after a claimant exhausts all available administrative remedies, finding that there is no case authority to support such an argument. In considering the date of accrual, the court expressed concern that to hold a cause of action in abeyance until a plaintiff elected to pursue an administrative appeal -- which would effectively permit claims to remain open-ended for an indefinite span of time -- would render any underlying statute of limitations period meaningless. Accordingly, the

District Court held that Loving's benefit claims accrued more than three years before his action was commenced.

In determining the accrual date of Loving's claims to be no later than January 3, 1991, the District Court applied the three-year limitations period contained in Delaware Code Annotated, title 10, Section 8106 (1975), and found that all of Loving's claims under ERISA Section 502(a)(1)(B) were time-barred. The District Court found it unnecessary to decide whether Loving's claims would be barred by Delaware's one-year limitations period applicable to wage and benefit claims.

On August 21, 1996, the Third Circuit Court of Appeals affirmed the decision of the District Court. The Third Circuit's Judgment Order notes that it carefully reviewed the record and considered all of Loving's contentions, including Loving's arguments that (1) Loving's ERISA § 503 cause of action did not accrue until after the plan administrator had given notice denying an appeal from the decision denying benefits; (2) a three-year statute of limitations applied to Loving's claim; (3) Pirelli's failure to provide requested plan information constituted a breach of fiduciary duty; (4) Loving's request for plan information was not subject to separate statute of limitations where the request is pursuant to ERISA § 502; and (5) Loving is eligible for requested pension benefits. After considering these arguments, the Third Circuit affirmed the decision of the District Court without stating any specific grounds. The Third Circuit subsequently denied rehearing en banc.

ARGUMENT

I. There Are Multiple Grounds On Which To Affirm The Decision Of The Third Circuit

The Third Circuit's decision is sustainable on several different grounds, only one of which is even alleged to create a conflict among the Circuits. Indeed, the Third Circuit's rejection of any one of Loving's arguments on appeal to that court would have permitted the Third Circuit to affirm the District Court's decision. In particular, Loving's appeal could not succeed upon a finding (i) that the federal discovery rule applied to his claim for benefits and his claim therefore accrued either when he first learned of his alleged injury or when his claim was first denied; (ii) that a one year statute of limitations applied to his claim for benefits; or (iii) that he was not entitled to the benefits he claimed under the Salaried Plan.

Because the Third Circuit did not specify the basis on which it affirmed the decision of the District Court, the Supreme Court could affirm on any of the grounds listed above. As explained above, the possibility of the Supreme Court could affirm on grounds with respect to which certiorari is not sought is a compelling reason to deny a writ of certiorari.

II. Petitioner Has Not Identified Any Conflict Among The Circuit Courts Of Appeal Created By The Third Circuit's Decision In This Case

Even assuming, as Loving does, that the Third Circuit affirmed based on the District Court's holding that the statute of limitations on his benefits claim was governed by the federal discovery rule and was therefore not timely because he had long ago discovered the facts upon which he based this claim, i.e., that he would not receive a benefit to which he believed he was entitled a writ of certiorari is not warranted because such a holding would be entirely consistent with well established case law.

III. Application Of The Federal Discovery Rule To Loving's ERISA Benefits Claim Was Not Contrary To Any Decision Of This Court And Does Not Create A Conflict Among The Circuit Courts

The decision of the District Court that the federal discovery rule applies to an ERISA claim for benefits, and that discovery occurs when a participant learns that he will not receive a benefit to which he believes he is entitled or when a claim for benefits is first denied, is well supported by numerous Circuit Court decisions. See, e.g., Tanzillo v. Local Union 617 Int'l Bhd. of Teamsters, 769 F.2d 140, 144 (3d Cir. 1985) (claim accrues at the grant or denial of pension benefits); Miles v. New York Teamsters Conference, 698 F.2d 593, 598 (2d Cir.) (claim accrues when repudiation of claim is made known

to the beneficiary), cert. denied, 464 U.S. 829 (1983); Price v. Provident Life & Accident Ins. Co., 2 F.3d 986, 988 (9th Cir. 1993) (claim accrues when participant learns of denial of benefits); Jenkins v. Local 705, Int'l Bhd. of Teamsters Pension Plan, 713 F.2d 247, 253-54 (7th Cir. 1983) (benefits claim accrues at initial denial of plaintiff's pension application).

Applying the discovery rule to this case, the District Court correctly concluded that Loving's claims accrued either when he was first notified of his pension entitlement in January 1988, or, at the latest, when his claim was formally denied by the Salaried Plan in January 1991. In either case, and even assuming a three year statute of limitation as Loving contends, his ERISA claims are barred because he did not commence this action until April 1994.

Loving does not identify any decision of this Court, or any Circuit Court, that is inconsistent with the decision of the District Court in this case or contrary to the authority cited above. Rather, Loving's primary argument as to why a writ of certiorari is warranted is that because the Third Circuit's decision -- assuming the District Court's application of the discovery rule was the basis for the affirmance -- is contrary to established authority requiring an ERISA plan participant to exhaust internal plan administrative remedies in order to maintain an ERISA benefits claim in court. Loving cites a number of Circuit Court cases that stand for the general proposition that ERISA plan participants must exhaust administrative remedies before commencing a lawsuit. See Petition at 1-10. Yet neither the District Court nor the Third Circuit held, or even suggested, that ERISA plan participants were not required to exhaust their administrative remedies.

Indeed, Loving argued before both the District Court and the Third Circuit that the ERISA exhaustion requirement compelled a finding that his ERISA benefits claim did not accrue until he finally exhausted his plan remedies in April 1991. This argument was properly rejected by both courts.

Logically, there is nothing inconsistent with the ERISA exhaustion requirement and application of the discovery accrual rule. Both rules serve separate important public policies. The discovery accrual rule prevents the assertion of stale claims. The exhaustion requirement promotes "fully considered actions by pension plan trustees to assist courts if the dispute is eventually litigated." Mason v. Continental Group, Inc., 763 F.2d 1219, 1227 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986). There is simply no reason -- and Loving does not suggest one -- why a participant could not exhaust his plan administrative remedies and also commence an action within the limitations period for an ERISA benefits claim.[3] In Loving's particular case, there is no explanation in the record why he waited more than six years before bringing his claim for benefits (and five years after the Salaried Plan was terminated).

Moreover, Loving's Petition does not address the problems that would arise if the accrual date for a claim under ERISA Section 502 were triggered only upon a plaintiff's final exhaustion of administrative remedies. Such a rule, as the District Court observed, could extend indefinitely the time when

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[3] As discussed below, the time limitations for deciding claims and appeals effectively prevent the statute of limitations from running while a participant exhausts his administrative remedies.

a federal action could be commenced, and would place the timing of a claim wholly within the control of a claimant. Loving ignores this significant policy issue in his Petition.

It is wholly illogical to allow the date of accrual for a federal cause of action under ERISA Section 502(a)(1)(B) to be determined by the whim of the claimant's decision as to when to initiate an administrative claims procedure. Indeed, neither the ERISA statute itself nor the regulations promulgated by the Department of Labor mandate a particular time period in which a party must begin the administrative remedies process.[4/] Thus, as Loving did, a party could sit back and wait for years before filing a claim with the plan administrator challenging pension benefits determinations.

Loving's accrual argument is also unsound because it fails to account for the many instances when the exhaustion of administrative remedies requirement is waived by the courts on the grounds that any administrative appeal would be futile. For instance, employees are not required to exhaust administrative remedies when an employer previously has denied all similar applications for benefits, Berger v. Edgewater Steel Co., 911 F.2d 911, 916 (3d Cir. 1990), cert. denied, 499 U.S. 920 (1991), where plaintiffs demonstrate that there are no factual disputes to be resolved on appeal, Fulk v. Hartford Life

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[4] Furthermore, there is no requirement in the statute or in the regulations that plans limit the time period in which a claim may be filed by a plan participant. In fact, the only prescribed time periods with respect to a plan's administrative claims procedure are requirements specifying when a plan administrator must respond to the participants. See DOL Reg. § 2560.503-1; 29 C.F.R. § 2560.503-1 (1997).

Ins. Co., 839 F. Supp. 1181, 1186 (M.D.N.C. 1993), or when a plan has been terminated and the assets have been dispersed. Hutchinson v. Wickes Cos., 726 F. Supp. 1315, 1321 (N.D. Ga. 1989). Based on the foregoing authority, Loving could probably have argued successfully that he was not, in the circumstances of this case, required to exhaust. Pirelli has interpreted the Salaried Plan provisions at issue in the same consistent manner, and the Salaried Plan was terminated in 1989. This issue is also not addressed in Loving's Petition. Nor does he explain why a participant is not fully protected by filing a suit and seeking a stay to allow completion of the administrative process.

Thus, Loving's position would wholly eviscerate the important public policies that are advanced by legislating definite and reasonable statutes of limitations.

IV. Application Of The Discovery Rule To Loving's ERISA Benefits Claims Is Not Contrary To Public Policy

Loving also argues that the decision of the Third Circuit is contrary to public policy because it will force a participant to commence an action for benefits prior to exhaustion of his administrative remedies. Petition at 11-13. Loving raises the specter of a "manipulative plan administrator" who fails to respond to an initial claim for benefits, or delays responding to an appeal, and argues that a participant will be forced to retain an attorney to deal with this quandary. Id. at 12-13.

Loving's argument should be rejected for at least three reasons. First, this case unquestionably did not involve a "manipulative plan administrator" delaying a response to either an initial claim for benefits or an appeal. Loving's attorney filed a claim for benefits on behalf of Loving on October 31, 1990. The Salaried Plan denied the claim (with a detailed explanation) two months later on January 3, 1991. Loving filed an appeal on March 1, 1991, which was denied on April 22, 1991. Thus, the Court is simply not required in this case to address the situation of unreasonable delay in responding to a participant's claim for benefits or a subsequent appeal.

Second, as Loving acknowledges, ERISA provides strict time limits for a plan administrator to respond to a claim for benefits. Petition at 5-10. Department of Labor regulations require a plan administrator to respond to a claim filed by a participant within 90 days and rule on any appeal therefrom within 60 days, subject to certain exceptions. See DOL Reg. § 2560.503-1; 29 C.F.R. § 2560.503-1 (1997). If the administrator fails to respond to a claim in a timely manner, the claim will be "deemed denied." DOL Reg. § 2560.503-1(e)(3) (1997). Thus, although not relevant in this case because the Salaried Plan administrator complied with the time limitations set forth in the Department of Labor regulations, those regulations prevent a "manipulative plan administrator" from unreasonably delaying a decision on a claim or appeal.

Third, although Loving speculates that a participant will be prejudiced by not having an attorney assist in the initial administrative claim and appeal procedures, Loving in fact had an attorney assisting him in each of these phases of his exhaustion efforts. Indeed, as early as September 1990, Loving

had retained an attorney to assist him in making a claim for benefits from the Salaried Plan. In any event, because Department of Labor regulations require prompt responses to claims for benefits and appeals of denied claims, a participant has sufficient time to retain an attorney after the appeal to determine whether to commence litigation. Indeed, the entire claim and appeal process serves to narrow the issues and should facilitate a determination, with the assistance of counsel, as to whether litigation is warranted.

Finally, Loving's public policy arguments ignore the important public policy considerations, discussed above, that compel application of the discovery rule to ERISA benefits claims, i.e., that the date of accrual for a federal cause of action under ERISA Section 502(a)(1)(B) should not be determined by the whim of when a claimant decides to initiate an administrative claims procedure. The District Court correctly found that these public policy considerations required application of the discovery rule to Loving's benefits claims and that Loving discovered his alleged injury more than three years before he commenced this action. Thus, assuming that the Third Circuit affirmed on this bases, its decision was not only entirely consistent with the decision of other Circuit Courts, but was also not contrary to public policy.

V. The Third Circuit's Decision Can Also Be Affirmed Based On A Finding That Loving's Claim For Benefits Is Governed By A One Year Statute Of Limitations

Loving argues that the Third Circuit's decision "accepts the suggestion" of the District Court that "a benefits claim would apply a non-contract period of statute of limitations." Petition at 11. According to Loving, this conclusion is contrary to this Court's decisions in Kemmerer v. ICI Americas, Inc., 70 F.3d 281, 287-88 (3d Cir. 1995), cert. denied, 116 S. Ct. 1826 (1996) and Senior Executive Benefits Plan Participants v. New Valley Corp., 89 F.3d 143, 149-50 (3d Cir. 1996), cert. denied, 117 S. Ct. 947 (1997).

Although Loving does not explicitly make the argument in his Petition, and the District Court never reached the issue, Loving's Petition reasserting the argument he made before the District Court and the Third Circuit that Delaware's three year statute of limitations applicable to contract actions should apply to his benefits claim rather than Delaware's one year statute of limitations applicable to wage and benefits claims.[5] Although the Third Circuit did not expressly reject Loving's argument that a three year statute of limitation applied to his benefits claim (and the District Court never reached the issue), as discussed below, a one year statute of limitations

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[5] Federal courts borrow the forum state's statute of limitations applicable to the most analogous state law claim to determine the appropriate statute of limitations period. Vernau v. Vic's Mkt., Inc., 896 F.2d 43, 45 (3d Cir. 1990).

should bar Loving's benefits claim even if it did not accrue until after he completed his long-delayed efforts to exhaust.

In Delaware, any claim for work or labor already performed, or "for any other benefits arising from such work," is expressly governed by Delaware Code Annotated, title 10, Section 8111 (1975), which provides for a one-year statute of limitations. Delaware courts have uniformly applied this limitations period to claims for all types of employment benefits -- including retirement benefits -- arising from work already performed. See, e.g., Vinson v. University of Delaware, No. 430, 1989, 1990 Del. LEXIS 152, at *1 (Del. Apr. 18, 1990) (applying Section 8110 (now § 8111) to claim to recalculate and increase compensation under a pension plan); Turner v. Diamond Shamrock Chems. Co., No. C.A. 85C-DE-130, 1987 WL 17175, at *2 (Del. Sept. 14, 1987) (applying Section 8111 to claim for severance brought under ERISA); Mitchell v. E.I. Du Pont de Nemours & Co., 310 A.2d 641, 642 (Del. 1973) (applying Section 8110 (now §8111) to claim for disability benefits). See also Sorensen v. Overland Corp., 142 F. Supp. 354, 360 (D. Del. 1956) ("The one year statute has a comprehensive sweep [and] was intended to bar all claims arising out of the employer-employee relationship." "The word 'benefits' is embracing and covers all advantages growing out of the employment."), aff'd, 242 F.2d 70 (3d Cir. 1957).

There is no dispute that Loving's claim under ERISA are for pension benefits arising out of work he already performed. Thus, Loving's claims must necessarily be governed by Delaware's one-year limitation period.

In an analogous case, the Eighth Circuit, in Adamson v. Armco, Inc., applied a wage claim statute of limitations to an ERISA benefits claim rather than a longer contract statute of limitations. 44 F.3d 650, 651-52 (8th Cir.), cert. denied, 116 S. Ct. 85 (1995). Applying precisely the same rationale urged here by Pirelli, the Eighth Circuit held that the more analogous two-year wage claims statute of limitations should apply. Id.

Neither of the two decisions relied on by Loving address the statute of limitations applicable to an ERISA benefits claim. In Kemmerer, the court applied breach of contract principles to determine whether the terms of a plan were breached. 70 F.3d at 287-88. In Senior Executive Benefits Plan Participants, the court ruled that extrinsic evidence should be permitted to interpret a "top hat" employee benefits plan. 89 F.3d at 149-50. Obviously, the decision of the Third Circuit in this case is not contrary to either of these decision.

CONCLUSION

Based on the foregoing, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,
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